The Freedom of the Seas

JOHN H. LATANÉ, PH.D.

Johns Hopkins University

DURING the recent war no phrase has been so freely used and so imperfectly understood as "the freedom of the seas." Germany interpreted it as meaning the overthrow of British naval supremacy; Great Britain invoked it against the unrestricted use of the submarine by Germany; while the United States appealed to it for the protection of American commerce against illegal interference by both belligerents. Under these circumstances the public was unable to get any very clear conception of the meaning of the phrase. Unfortunately, the term has been glibly used by writers whose interest in international law was first aroused in August, 1914. It is important, therefore, in any consideration of the subject, to inquire what the meaning of the term was prior to the outbreak of the recent war.

DEFINITION OF TERMS

In arriving at an understanding of the term "freedom of the seas," it is necessary to define the term "seas." As used in this connection, it means "high seas." This latter term may have been adopted as descriptive of the apparent elevation of the surface of the sea when looked at from the shore. It is undoubtedly also connected with the meaning of "high" in the sense of "high" way. In the case of *United States* v. *Rogers*, decided by the Supreme Court in 1893, Mr. Justice Field, speaking for the court, said:

> It is to be observed also that the term "high" in one of its significations is used to denote that which is common, open, and public. Thus every road or way or navigable river which is used freely by the public is a "high" way. So a large body of navigable water other than a river, which is of an extent beyond the measurement of one's unaided vision, and is open and unconfined, and not under the exclusive control of any one nation or people, but is the free highway of adjoining nations or people, must fall under the definition of "high seas" within the meaning of the statute.

Since the days of Bynkershoek (1702), it has been generally conceded that each nation has a right to exercise jurisdiction over

the seas surrounding its territory to the extent of three marine miles. Such jurisdiction is not absolutely exclusive, for the vessels of other nations have the right of innocent passage through this marine belt. At the time that Bynkershoek wrote his book, three miles was considered the greatest possible range of cannon, but the marine belt having become fixed by common consent, it has not been extended with the increased range of modern guns. The term "high seas," therefore, embraces all that part of the ocean beyond the three mile limit and not subject to the jurisdiction of any nation.

THE ORIGIN OF THE DOCTRINE

For the modern doctrine of the freedom of the seas, we are indebted to Hugo Grotius, whose book entitled *Mare Liberum* was published in 1609. The object of this treatise was to demonstrate the right of the Dutch to sail to the East Indies and engage in trade there against the exclusive pretensions of the Portuguese, which were based on the Papal Bull of 1493 drawing a line through the Atlantic and assigning Spain exclusive rights to the west and Portugal to the east. The argument of Grotius was both elaborate and lucid. He claimed, first, that the ocean was so vast that no nation could effectually appropriate it; and second, that the ocean was susceptible of unlimited use and ought, therefore, to remain perpetually in the same condition in which it was created by nature. He also claimed as an unimpeachable axiom of the law of nations that, "Every nation is free to travel to every other nation, and to trade with it." It thus appears that the demand of land-locked peoples for an outlet to the sea is nothing new.

The principles laid down by Grotius made a wide appeal, and soon became generally accepted, so that the freedom of the seas in time of peace (and this, it should be remembered, is what Grotius was contending for) has long been established and is not now seriously questioned. When, therefore, we speak of the freedom of the seas today, we do not mean the freedom of the seas in peace—about which there is no controversy—but the freedom of the seas in time of war.

By common consent belligerents have been permitted to exercise powers on the high seas in time of war which no nation is permitted to exercise in time of peace. The recognized rights

of belligerents are as follows: to capture enemy vessels on the high seas; to prevent neutrals from trading with the enemy in articles contraband of war; to stop all trade with duly blockaded ports or coasts of the enemy, and, in order to enforce the above rights, to visit and search neutral merchant vessels on the high seas. A long controversy was waged in the seventeenth and eighteenth centuries over the question of the right of a belligerent to remove enemy goods from a neutral ship. The Dutch advanced the doctrine of "free ships, free goods." This controversy, as well as several others relating to maritime warfare, was finally settled by the Declaration of Paris, issued by the powers of Europe at the close of the Crimean war in 1856. That declaration marked a great advance, but it did not by any means establish the freedom of the seas, for serious limitations on the rights of neutrals to trade with belligerents were confirmed by it. Its provisions were:

1. Privateering is and remains abolished;
2. The neutral flag covers enemy's goods, with the exception of contraband of war;
3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag;
4. Blockades, in order to be binding, must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

THE AMERICAN DOCTRINE

The United States was invited to adhere to this declaration, but declined for reasons clearly set forth by Secretary Marcy. The United States had long stood for the principles contained in the second, third and fourth rules, but, as Mr. Marcy stated, it was not the policy of the United States to maintain a large navy, and we were, therefore, unwilling to agree that privateering should be abolished unless the powers of Europe would agree to exempt private property from capture in time of war. The powers of Europe were unwilling to accept this amendment and, consequently, the United States did not become a party to the declaration. At the beginning of the Spanish war, we agreed with the government of Spain not to engage in privateering, so that the question has since been regarded as settled.

The American conception of the freedom of the seas is closely associated with the efforts which we have made since our birth

as a nation to secure the exemption of private property from capture at sea, and to limit naval warfare to a conflict between armed vessels. In fact, during the negotiations of the treaty of 1783, Benjamin Franklin proposed to Richard Oswald an article containing the following provisions:

> And all merchants or traders with their unarmed vessels employed in commerce, exchanging the products of different places, and thereby rendering the necessaries, conveniences, and comforts of human life more easy to obtain and more general, shall be allowed to pass freely, unmolested. And neither of the powers parties to this treaty shall grant or issue any commission to any private armed vessels empowering them to take or destroy such trading ships or interrupt such commerce.

These proposals were not embodied in the treaty with England, but they do appear in almost the same words in article 23 of our treaty of 1785 with Prussia.

The United States has persistently advocated the exemption of private property from capture on the seas. President Monroe stated in his message of December 2, 1823, that instructions had been given to United States ministers abroad to propose to the governments to which they were accredited "the abolition of private war on the sea." President Pierce in his message of December 4, 1854, said:

> Should the leading powers of Europe concur in proposing as a rule of international law to exempt private property on the ocean from seizure by public armed cruisers as well as by privateers, the United States will readily meet them upon that broad ground.

In the war of 1866, Austria, Italy and Prussia agreed to the principle of immunity of private property at sea for the period of that war. Five years later, the principle was embodied in a treaty between the United States and Italy in the following terms:

> The high contracting parties agree that in the unfortunate event of a war between them the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels or by the military forces of either party, it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party.

In 1904 the Congress of the United States adopted the following resolution:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the sense of the Congress of the United States that it is desirable, in the interest of uniformity of action by the maritime states of the world in time of war that the President endeavor to bring about an understanding among the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents.

The American delegates at the first Hague Conference in 1899, at the second Hague Conference in 1907, and at the London Naval Conference of 1908–1909, acting under instructions from their government, urged upon the assembled powers the adoption of the American doctrine of the immunity of private property on the seas. In these various proposals the United States did not, of course, include contraband of war or goods bound for a blockaded port.

The American doctrine has always seemed to me to be a debatable question. It has always been based on the assumption that private property on land is exempt from capture and destruction. This assumption is false. We need only refer in this connection to Sherman's march through Georgia and to the present war. An invading army under modern conditions, like an army of ants, eats up everything in its path, and consumes what it does not wantonly destroy. Private property on land enjoys only a theoretical immunity.

On the other hand, the seizure of private property on the seas does not work the same hardship on non-combatants as the confiscation of property on land. Modern ships and cargoes are usually owned by wealthy corporations and the insurance is widely distributed. The loss of such ships and cargoes is, therefore, a national loss, and it is one of the most effective means of exerting pressure on an enemy and forcing him to come to terms. However this may be, when an American talks about the freedom of the seas, he is usually understood to mean the exemption of private property from capture in time of war. President Wilson undoubtedly has had this in mind in his various statements in regard to the freedom of the seas, though in linking the matter up with the League of Nations he probably has meant this and something more. In the second of his fourteen points occurs the following stipulation: "Absolute freedom of navigation upon

the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants."

The period of the Civil war marked a radical departure from the historic attitude of the United States on almost all questions of maritime warfare. Prior to that time we had been concerned mainly with the defense of neutral rights, but during the Civil war the United States pushed belligerent rights to the utmost limits. The contraband list was extended; the doctrine of continuous voyage was given a new application; a commercial blockade of the entire Confederate coast was established which in the last year of the war became the most rigid "starvation blockade" in history; and the British practice of seizing a vessel bound for a blockaded port the moment it left its home waters was adopted.

In applying the doctrine of continuous voyage the United States made a most radical departure from the recognized rules of international law in seizing cargoes bound for neutral ports adjacent to the Confederacy on the ground that they were to be reshipped to Confederate ports. The doctrine as previously developed by the English Admiralty courts applied only to cases where the ship was to continue the voyage to a belligerent port. The sole rule for determining the destination of the cargo prior to the American Civil war was that the destination of the cargo followed the destination of the ship. The American doctrine separated vessel and cargo, and held that a vessel might have a neutral destination while the cargo might have a belligerent destination. The case of the *Springbok* decided by the United States Supreme Court in 1866 affords perhaps the best illustration of the extension of the doctrine of continuous voyage. This vessel sailed from London in 1862 for Nassau in the Bahamas. She was captured before reaching that port and brought into New York, where she was libeled as a prize. The district court condemned both the vessel and the cargo. The case was appealed to the Supreme Court, which affirmed the decree as to the cargo but released the vessel. The court thus held that the ultimate destination of the cargo rather than the destination of the ship determined the liability of the cargo to condemnation. This decision was in conflict with the established rule of law that neutral property under a neutral flag, while on its way to a neu-

tral port, was not liable to capture or confiscation. Several other cases involving the same principle were decided by the Supreme Court at the same time.

THE ENGLISH INTERPRETATION

This decision of the Supreme Court was very severely criticised by English and Continental writers, though, strange to say, the British government made no demand for reparation. Great Britain, however, continued for some time to hold to the old rule, and in the Manual of Naval Prize Law, issued by the Lords Commissioners of the Admiralty in 1888, we find the subject fully covered in the following paragraphs:

71. The ostensible destination of the vessel is sometimes a neutral port, while she is in reality intended, after touching and even landing and colorably delivering over her cargo there, to proceed with the same cargo to an enemy port. In such a case the voyage is held to be "continuous," and the destination is held to be hostile throughout.

72. The destination of the vessel is conclusive as to the destination of the goods on board. If, therefore, the destination of the vessel be hostile, then the destination of the goods on board should be considered hostile also, notwithstanding it may appear from the papers or otherwise that the goods themselves are not intended for the hostile port, but are intended either to be forwarded beyond it to an ulterior neutral destination, or to be deposited in an intermediate neutral port.

73. On the other hand, if the destination of the vessel be neutral, then the destination of the goods on board should be considered neutral, notwithstanding it may appear from the papers or otherwise that the goods themselves have an ulterior hostile destination, to be attained by transshipment, overland conveyance, or otherwise.

A few years later, however, when Great Britain became engaged in the South African war, she undertook to apply the American doctrine. The Boer republics had no seaports. The principal port of entry for goods bound for the Transvaal was Lorenzo Marquez on Delagoa Bay, in Portuguese territory. Supplies for the South African belligerents were sent to this port and transshipped by rail to the Boer republics. In December, 1899, and January, 1900, three German vessels were seized by British war vessels on the ground of carrying contraband to the South African republics. The vessels seized were the *Herzog*, the *General* and the *Bundesrath*. The German government at once protested, and the British government found some diffi-

culty in reconciling its action with the provisions quoted above from the Manual of Naval Prize Law. As, however, the German ships were found not to have any contraband aboard, they were released with the payment of compensation for the delay, and the incident was closed.

The London Naval Conference of 1908–1909 undertook to settle this controversy by a compromise, as the following articles will show:

Art. 30. Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails either transshipment or transport over land.

Art. 33. Conditional contraband is liable to capture if it is shown that it is destined for the use of the armed forces or of a government department of the enemy state, unless in this latter case the circumstances show that the articles cannot in fact be used for the purposes of the war in progress.

Art. 35. Conditional contraband is not liable to capture, except when on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and is not to be discharged at an intervening neutral port.

Art. 36. Notwithstanding the provisions of Article 35, if the territory of the enemy has no seaboard, conditional contraband is liable to capture if it is shown that it has the destination referred to in Article 33.

A liberal construction of these articles, taken in connection with an extension of the contraband list, will be found to justify most of the steps taken by England in her "blockade of Germany." In separating the goods from the ship the United States Supreme Court undermined an established rule that was simply and easily applied and opened the way for endless contention and ingenious argument. In the recent war Great Britain carried the doctrine of ultimate destination to its logical limits and, furthermore, ignored the distinction which the London Naval Conference had drawn between absolute and conditional contraband. In answer to the protest of the United States she quoted the decisions of the Supreme Court in the Prize Cases of 1866. Some writers, it is true, claim that the United States did not extend the doctrine to conditional contraband. This is true, but then it is also true that the court did not have to, for in the Civil war cases the entire Confederate coast was blockaded and, therefore, non-contraband was liable to seizure.

WHAT IS CONTRABAND?

One of the greatest difficulties in applying any of the rules of maritime warfare is the impossibility of drawing a sharp distinction between contraband and non-contraband. Modern warfare has become so complex that there are very few articles which are not susceptible of military use. It is also difficult to draw any sharp distinction between manufactured munitions of war and the raw materials of which they are made. A modern industrial nation like Germany can manufacture all the military supplies she needs provided she can obtain the raw materials. In fact, during the greater part of the recent war Germany was better equipped for manufacturing munitions than any of her enemies or than any of the neutral countries, and she would not have objected to the cutting off of the manufactured products provided she could have been supplied with the materials she needed.

We have reached a point where we must either abolish all right of blockade, all right to seize contraband, and limit naval operations to armed conflicts between men-of-war, or else we must surrender all neutral rights of trade in time of war and permit a power which has a naval force strong enough to do it, to stop absolutely all trade with the enemy.

THE LEAGUE OF NATIONS AND THE FREEDOM OF THE SEAS

The latter alternative is precisely what is provided for in the covenant of the League of Nations in any war between the members of the league and a recalcitrant state. Article 16 provides:

> Should any member of the league resort to war in disregard of its covenants under Article 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other members of the league, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking (state) and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking (state) and the nationals of any other state, whether a member of the league or not.

In case the council of the league fails to make a recommendation for the settlement of the dispute submitted to it, the parties to the dispute will presumably be permitted to fight it out, and the constitution of the league makes no provision as to what rules

shall apply to the conflict. In the absence of any such provision, it is presumed that the present rules of maritime warfare would apply. But the constitution of the league undoubtedly implies some new revision or codification of the rules of international law. If war is to be permitted between members of the league, it should be restricted as much as possible, and if third parties are to be kept out, existing rules governing maritime warfare will have to be thoroughly revised. In this connection it is well to recall again the second one of the fourteen points: "Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants."

If this idea is carried out in a war between the league and a recalcitrant member, there will be no neutrals, and the covenant-breaking state will be absolutely isolated and interdicted. On the other hand, in a war between individual members of the league, over a dispute which the council has been unable to settle, the neutral members of the league should be permitted to continue uninterrupted their commercial relations with the belligerents, and there would then be freedom of the seas in war as well as in peace.